FEDERAL MARITIME COMMISSION

46 CFR PART 572

[DOCKET NO. 87-24]

FOREIGN-TO-FOREIGN AGREEMENTS - EXEMPTION

AGENCY: Federal Maritime Commission.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Federal Maritime Commission discontinues this rulemaking proceeding. The basis for this action is that the Commission is without jurisdiction to regulate agreements among ocean carriers governing foreign-to-foreign transportation. Such agreements no longer will be accepted for filing pursuant to section 5 of the Shipping Act of 1984.

DATE: This action is effective upon publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

Robert D. Bourgoin
General Counsel
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5740

SUPPLEMENTARY INFORMATION:

## PROCEEDING

The Federal Maritime Commission ("Commission" or "FMC") instituted this proceeding by Notice of Proposed Rulemaking published in the Federal Register. 52 FR 46501 (1987). The Commission therein proposed to amend its regulations to explicitly permit voluntary filing of carrier agreements governing ocean transportation wholly between foreign countries, "where the parties to the agreement deem it to

have a direct, substantial and reasonably foreseeable effect on the commerce of the United States." Id. at 46505. This change would enable such "foreign-to-foreign" agreements, though not subject to the mandatory filing requirements of the Shipping Act of 1984 ("1984 Act"), to qualify for immunity from the U.S. antitrust laws.

The proposed rule also would exempt from the notice, waiting period and information requirements of the 1984 Act foreign-to-foreign agreements that are part of broader agreements covering contiguous U.S.-foreign trades. Such foreign-to-foreign agreements thus would be effective immediately upon filing.

Comments in general support of the proposed rule were filed by the Gulf-European Freight Association, the North Europe-U.S. Gulf Freight Association, the North Europe-U.S. Atlantic Conference and the U.S. Atlantic-North Europe Conference; the Pacific Coast European Conference and the North Europe-U.S. Pacific Freight Conference; Crowley Maritime Corporation; the Virginia Port Authority; the Transpacific Westbound Rate Agreement; Bermuda Container Line, Ltd.; the Port Authority of New York and New Jersey ("PANYNJ"); CAST (1983) Ltd. ("CAST") and Canada Maritime Limited ("CML"); and the Asia North America Eastbound Rate Agreement, The 8900 Lines, the Greece/United States Atlantic and Gulf Conference, the Mediterranean North Pacific Coast Freight Conference and the South Europe/U.S.A. Freight Conference ("ANERA et al.").

Comments in opposition to the proposed rule were filed by the Antitrust Division of the U.S. Department of Justice ("DOJ").

## BACKGROUND

Section 4(a) of the 1984 Act states that the statute applies to agreements to engage in any one of a catalogue of specified activities. 46 U.S.C. app. 1703(a). Section 5(a) requires that every agreement covered by section 4 must be filed with the Commission, but an exception is provided for "agreements related to transportation to be performed . . . between foreign countries . . . ." Id. § 1704(a). Despite this exception, a limited number of agreements concerning foreign-to-foreign ocean transportation has been filed voluntarily with the Commission. Typically, these agreements are augmentations to existing FMC agreements covering a contiguous U.S.-foreign trade.[1]

The comments filed in response to the proposed rule by the carriers and ports confirm that such agreements are filed with the Commission, notwithstanding the dispensation provided by section 5(a), as a consequence of section

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[1] For example, a group of carriers providing service, pursuant to an effective agreement, at fixed rates between the U.S. Pacific Coast and Japan expand their services to include transportation between Vancouver and Japan, and file an amendment with the Commission stating that they will agree upon rates for that foreign-to-foreign service as well.

7(a)(3) of the 1984 Act.[2] That provision grants immunity from the antitrust laws to foreign-to-foreign transportation agreements, but withholds immunity from such agreements that have a "direct, substantial, and reasonably foreseeable effect on the commerce of the United States . . . ." 46 U.S.C. app. 1706(a)(3). This phrase is a long-established test for determining U.S. antitrust subject-matter jurisdiction over anticompetitive activities that take place in foreign locations; if the effect of such activities manifests itself in U.S. commerce, the antitrust laws may be brought to bear regardless of where the acts took place or the nationality of the actor.[3] By filing their foreign-to-foreign agreements with the Commission voluntarily, the carriers are attempting to bring their concerted activities within the different immunity provided by section 7(a)(1) of the 1984 Act, which states that the antitrust laws do not apply to "any agreement that has been filed under section 5 of this Act and is effective . . . ." Id. § 1706(a)(1).[4]

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[2] E.g., Comments of ANERA et al. at 4-8; Comments of CAST and CML at 1-3.

[3] See United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). The standard was codified by the Foreign Trade Antitrust Improvements Act, 15 U.S.C. 6a (1982). DOJ also has indicated that, in certain situations, it will weigh considerations of international comity in determining whether to assert antitrust jurisdiction. See U.S. Department of Justice, Antitrust Guidelines for International Operations, 53 FR 21583, 21595-96 (1988), amended, 53 FR 22426 (1988). Obtaining in personam jurisdiction over the persons involved is a separate matter.

[4] E.g., Comments of PANYNJ at 2-5.

This practice puts at issue whether foreign-to-foreign agreements potentially ineligible for antitrust immunity under the standards of section 7(a)(3) may nevertheless obtain immunity through section 7(a)(1) if they are filed with the Commission, even though the Commission may not require that they be filed. This proceeding was intended to provide needed guidance to the industry and the Commission's staff by providing a formal resolution of this question.

The Supplementary Information to the proposed rule examined possible grounds for Shipping Act jurisdiction over foreign-to-foreign agreements. The Commission noted that one of Congress's fundamental purposes in enacting the 1984 Act was to place severe limits on the application of the antitrust laws to ocean liner shipping, and that it appeared to be inconsistent with that purpose to permit any gaps in the antitrust immunities available under the new statute. The Commission further observed that section 5(a) does not prohibit filing on a voluntary basis and that in personam Shipping Act jurisdiction can be established without difficulty over a carrier serving a foreign-to-foreign trade if that carrier also serves a U.S. port. The Commission acknowledged that it is without power to require the tariff filing of rates established pursuant to foreign-to-foreign agreements, but noted case law holding that an agency's jurisdiction to immunize anticompetitive activity from the antitrust laws is not necessarily limited to the scope of its power to regulate rates. Finally, it was observed that

accepting foreign-to-foreign agreements appeared to further the harmonization of U.S. laws with the laws and practices of foreign trading partners.

Under the proposed rule, foreign-to-foreign agreements that are filed as amendments to existing FMC agreements covering contiguous U.S.-foreign trades would be accepted and further would be exempted, pursuant to section 16 of the 1984 Act, 46 U.S.C. app. 1715, from the public notice, 45-day waiting period and information requirements otherwise imposed by section 6, id. § 1705. The Commission suggested that there appeared to be no need to delay the effectiveness of such filings in order to examine the question of jurisdiction because, where foreign-to-foreign operations are so closely proximate to and so immediately associated with U.S.-foreign operations, the foreign-to-foreign operations could be presumed to have the required "direct, substantial and reasonably foreseeable" effects on U.S. commerce. 52 FR at 46504.

The proposed exemption would not be available to other foreign-to-foreign agreements that do not adjoin a U.S.-foreign trade. However, such agreements still would be accepted for filing and they would be processed under the usual procedures. The Commission explained that the effect on U.S. commerce of such agreements is not likely to be readily apparent and that they "should therefore be reviewed

on a case-by-case basis." 52 FR at 46504.[5]

COMMENTS

A. Industry

In addition to supporting the theories suggested by the Commission with regard to its jurisdiction over foreign-to-foreign agreements, some of the comments filed by the carriers, carrier associations and ports urged amendments to the proposed regulations. CAST and CML took exception to a brief statement in the Notice indicating that the Commission might decline to accept jurisdiction over a particular non-contiguous agreement; they argued that the agency's powers are limited to rejecting under section 6(b), 46 U.S.C. app. 1705(b), an agreement that does not meet the content requirements of section 5, id. § 1704, or seeking to enjoin an agreement that threatens to harm competition in the manner specified by section 6(g), id. § 1705(g).

With regard to the Commission's proposal that foreign-to-foreign agreements may be filed "where the parties deem such an agreement to have" the requisite effects on commerce, CAST and CML expressed concern that compliance with this standard might estop the parties from thereafter

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[5] The proposed exemption also would not apply to a new agreement that included both foreign-to-foreign and U.S.-foreign transportation within its scope. Such an agreement would be processed according to the usual procedures because it would not be practical to segregate the strictly foreign-to-foreign aspects of the agreement for treatment under the exemption, while the rest of the agreement received normal processing, including the statutory 45-day waiting period.

asserting, as part of a defense against an antitrust suit, that their agreement in fact did not have such effects; they suggested that the language of the proposed regulation be amended to read "that where the parties believe that such an agreement may arguably have . . . ." Comments of CAST and CML at 16.[6]

PANYNJ and CAST/CML opposed the proposed exemption for contiguous trade foreign-to-foreign agreements. They argued that the Commission should not permit agreements with putatively substantial effects on U.S. commerce to gain antitrust immunity without prior review of their impact on competition or compliance with the normative provisions of the 1984 Act. PANYNJ asserted that it competes with Montreal for cargo and that ocean carriers calling at both ports "could agree with Canadian carriers and others in the Canadian/European trade to maintain a fixed rate differential between New York/New Jersey and Montreal," to the former's detriment. Comments of PANYNJ at 9. Such an agreement, it was argued, should not be eligible for immediate effectiveness. PANYNJ concluded that the Commission had not made the showing required by section 16 of the 1984 Act that the proposed exemption will not be unjustly discriminatory, result in a substantial reduction in competition or be detrimental to commerce.

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[6] The same argument was made by Bermuda Container Line.

B. Department of Justice

DOJ opposed the proposed rule on the ground that it would be an unlawful extension of the Commission's jurisdiction and submitted detailed arguments in support of its position. Specific references to these arguments are provided in the discussion below. In particular, DOJ contended that carriers that are parties to a foreign-to-foreign agreement are not "ocean common carriers" within the Commission's jurisdiction for purposes of that agreement, even if they are within the Commission's jurisdiction for purposes of other operations that do take place within U.S. foreign commerce. DOJ also asserted that, had Congress wished carriers to be able to file agreements in foreign-to-foreign trades on a voluntary basis under the 1984 Act, it would have been as unequivocal on that subject as it was about the tariff and agreement filing provisions that are set forth in the statute. In that regard, DOJ cited longstanding case law holding that displacement of the antitrust laws, no matter how desirable as a matter of economic policy, must be done by express Congressional mandate and not by implication or inference.

## DISCUSSION

The issue of law raised by this rulemaking proceeding may be analyzed from three perspectives:

1. Can the section 7(a)(1) antitrust immunity available through section 5(a)'s mandatory filing

requirement also be obtained through voluntary filing of an otherwise excepted agreement?

2. Did section 7(a)(3)'s preservation of antitrust jurisdiction over certain foreign-to-foreign agreements also create Shipping Act jurisdiction to immunize such agreements?

3. Is the fact that a carrier serves U.S. ports and is thereby subject to FMC jurisdiction sufficient to permit the Commission to accept for filing that carrier's foreign-to-foreign agreements?

Based on the comments filed, particularly those of DOJ, and an extensive re-examination of the relevant legislative history of the 1984 Act and other materials, the Commission finds, for the reasons set forth below, that each of these interrelated questions must be answered in the negative and accordingly withdraws the proposed rule.

A. Early Developments: Creation of a Foreign-to-Foreign Exception and Elimination of a Voluntary Filing Option

The legislative reports that accompanied the 1984 Act specifically acknowledged the foundation laid by previous Congresses, particularly in the forging of a broad consensus on the need for clarified antitrust immunity and revised agreement filing procedures. E.g., S. Rep. No. 3, 98th Cong., 1st Sess. 13-14 (1983). Thus, the early efforts to reform the Shipping Act, 1916 ("1916 Act"), are relevant to whether adoption of this proposed rule would be consistent with Congressional intent, particularly since, as set forth

below, the status of foreign-to-foreign agreements was specifically considered during this period.

In July, 1979, Senator Inouye, the Chairman of the Merchant Marine Subcommittee of the Senate Commerce Committee, introduced a package of three bills that together constitute the progenitor of the 1984 Act. One of his proposals, the "Shipping Reform Act of 1979" (S. 1463), excluded foreign-to-foreign agreements from the jurisdiction of the Shipping Act, but provided a voluntary filing option for U.S. carriers:

> Agreements . . . in regard to transportation or transportation services between foreign countries or places that do not involve import or export of the transported goods into or out of the United States, shall not be subject to this Act; except that any common carrier by water in foreign commerce that is a citizen or resident of the United States may elect to submit any such agreement to which it is a party, or any modification or cancellation thereof, to the Commission for approval and when approved by the Commission such agreement, modification or cancellation whether or not subject to the antitrust laws of the United States shall be afforded all the exceptions from the antitrust laws of the United States that are afforded to waterborne foreign commerce under section 15 of this Act.

Ocean Shipping Act of 1979, Hearings before the Subcommittee on Merchant Marine and Tourism of the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess. 35-36 (1979) ("1979 Hearings"). Both aspects of this provision are significant because section 15 of the 1916 Act, 46 U.S.C. 814 (1982), did not explicitly exclude foreign-to-foreign agreements from its coverage, nor did it provide any guidance as to whether parties to such

agreements could submit their arrangements voluntarily to the Commission to avoid potential antitrust liability.

On September 18, 1979, the Deputy Assistant Attorney General in charge of DOJ's Antitrust Division testified in support of the foreign-to-foreign exclusion but opposed the "voluntary submission" option:

> A second proposal that deserves attention is that part of S. 1463 that would revise Section 15 to exclude from its scope agreements to be performed entirely in a foreign country or involving transportation between foreign countries if such transportation does not relate to United States imports or exports. United States citizens and residents, however, would be given the option of filing such agreements for the purpose of securing antitrust immunity. Insofar as these provisions would redefine the scope of the FMC's jurisdiction and clarify any existing uncertainties, we believe them well justified. However, we see no reason to enact that part of this provision that would give carriers the option of filing agreements that are otherwise beyond the scope of the FMC's geographical jurisdiction solely for the purpose of obtaining antitrust immunity. Although antitrust immunity would be unnecessary for most such arrangements because they would also be beyond the jurisdictional reach of the antitrust laws, in a few situations the antitrust laws would apply in cases where the Shipping Act would not. For example, it has been held that although the FMC might lack jurisdiction over such conduct, the antitrust laws would prohibit United States-flag carriers from fixing rates for carrying United States government-financed cargo between foreign ports. See Pacific Seafarers, Inc. v. Pacific Far East Lines, Inc., 404 F.2d 804 (D.C. Cir. 1968). We see no cause to immunize this type of conduct from the antitrust laws.

1979 Hearings at 89 (statement of Donald L. Flexner).

In February, 1980, the Senate Commerce Committee staff released for further comments a draft revision of the 1916 Act, combining Senator Inouye's original package of bills.

Foreign-to-foreign agreements were excepted from mandatory filing, the "voluntary submission" procedure remained, and the antitrust immunities provision specifically applied to both mandatory and voluntary filings. 1979 Hearings at 489-90, 498. However, on March 14, 1980, the Consultative Shipping Group ("CSG") of major European shipping nations and Japan submitted comments strongly supporting the exclusion of foreign-to-foreign agreements, but arguing that voluntary filing would undercut the exclusion:

> [The bill] in effect establishes the principle that the FMC has no jurisdiction over non-U.S. agreements. CSG Governments very much support this and consider that the Section would do a lot to remove sources of conflict between the United States and its CSG trading partners. The option for a U.S. party to file such an agreement destroys the whole rationale . . . .

Id. at 580.[7] On March 21, the Council of European and Japanese National Shipowners' Associations ("CENSA") submitted proposed amendments to the draft bill. CENSA's approach was similar to CSG's, in that voluntary filing was deleted in favor of more extensive and specific antitrust exemptions. Id. at 640-41, 652.

On April 18, 1980, the Senate Commerce Committee reported out S. 2585, the final version of the February staff draft. S. Rep. No. 656, 96th Cong., 2d Sess. (1980). The exception of foreign-to-foreign agreements from mandatory filing was preserved. Id. at 22. However,

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[7] The U.S. Department of State prevously had expressed similar concerns. 1979 Hearings at 218.

"voluntary submission" was eliminated and was never revived during the subsequent work by the 97th and 98th Congresses that eventually produced the 1984 Act. The antitrust immunity provision of S. 2585 no longer extended to voluntary filings. Id. at 27.

Although the 1980 Senate Report did not address the removal of voluntary filing, it is logical to attribute that result to the opposition voiced, not only by DOJ, but also by interests that might have been expected to support voluntary filing in some form, i.e., the CSG Governments and CENSA. Those groups instead wished the legislation to establish that foreign-to-foreign agreements were subject to neither the antitrust laws nor the Shipping Act. CSG in particular opposed voluntary filing because it feared an erosion of the new jurisdictional barrier between the Shipping Act and foreign-to-foreign agreements. Adoption now by the Commission of this proposed rule -- which, in effect, would allow a carrier to expand unilaterally the ordinary scope of the FMC's jurisdiction -- would contravene Congress's apparent decision to accommodate the concerns of

DOJ, CSG and CENSA.[8]

B. Section 7(a)(3) and Shipping Act Jurisdiction

In January, 1981, at the start of the 97th Congress, Senator Inouye continued his reform effort by introducing S. 125, which was basically identical to the bill passed by the Senate in April, 1980. In August, 1981, Senators Gorton, Stennis, Kasten and Inouye introduced S. 1593 as a possible alternative to S. 125. Both bills continued to provide unqualified antitrust immunity for foreign-to-foreign agreements.

In September, 1981, Sea-Land testified before the Senate and urged that the antitrust immunities provision be expanded so as to apply clearly to a variety of foreign-to-foreign transactions:

> [The bill] states that the antitrust laws shall not apply to any agreement or activity that applies solely to transportation services between foreign countries. We strongly support the provision, but urge that the record make clear its specific applicability to the following:
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> 1. Instances involving the relay or transshipment of foreign-to-foreign cargoes at U.S. ports.
> 2. Instances involving the movement of foreign-to-foreign cargoes across the U.S. in a landbridge operation.

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[8] In Notice of Inquiry Concerning Interpretation of Section 8(a) and Section 8(c) of the Shipping Act of 1984, ___ F.M.C. ___, 24 S.R.R. 131 (1987), the Commission concluded that it was unable to resolve administratively whether it is lawful for an ocean common carrier to file voluntarily tariffs for commodities that are exempted from mandatory filing under the 1984 Act. Unlike voluntary agreement filing, there was a consistent FMC policy, dating to 1961, of permitting voluntary tariff filing, and carrier interests had pointed out areas in which business operations and shipper-carrier relationships would be disrupted by a change in this policy. Id. at 135.

> 3. Instances of moving cargoes between a contiguous nation and another foreign nation via the United States.
> 4. Instances involving the movement of all cargoes between foreign countries, including U.S. Government impelled cargoes.

Hearings on S. 1593 and S. 125 before the Subcommittee on Merchant Marine of the Senate Committee on Commerce, Science and Transportation, 97th Cong., 1st Sess. 185 (1981) (statement of Peter J. Finnerty). In response to a question from Senator Gorton, Sea-Land indicated that, like CSG and CENSA, it believed that foreign-to-foreign activities should be outside the reach of the Shipping Act as well as the antitrust laws:

> Question. When you urge that antitrust immunity be clearly extended to the various examples of foreign-to-foreign commerce that pass through the U.S., do you suggest that these be or not be subject to filing of agreements and approval by the Commission?
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> Answer. We do not believe these agreements should be filed with the Commission. Foreign-to-foreign commerce should neither be subject to the Shipping Act nor to the antitrust laws.

Id. at 189.

Sea-Land's fourth category of activities that it wanted clearly immunized from the antitrust laws, i.e., "the movement of all cargoes between foreign countries, including U.S. Government impelled cargoes," appears to have been calculated to reverse Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969). In Pacific Seafarers, Inc. v. Atlantic & Gulf American-Flag Berth Operators, 8 F.M.C. 461 (1965), the Commission had found no 1916 Act jurisdiction

over an alleged conspiracy among American-flag shipping lines to destroy the complainant's business of carrying cargo financed by the U.S. Agency for International Development between Taiwan and South Vietnam. The Commission emphasized that the trade in question did not "involve as one terminus any port in a State, district, territory or possession of the United States." Id. at 465. Three years later, however, in separate antitrust litigation, the U.S. Court of Appeals for the District of Columbia Circuit found jurisdiction on the same facts under the Sherman Act, holding that, at least for antitrust purposes, "the sale of American-flag shipping services to foreigners is itself a form of United States foreign trade . . . ." 404 F.2d at 813.[9]

In its opposition to the proposed rule in this proceeding, DOJ emphasized the Commission's 1965 Pacific Seafarers holding and attributed to Congress an intent to confirm that decision in enacting the 1984 Act. DOJ Comments at 4-5, 11. Although no explicit confirmation of that thesis appears in the legislative history, the 1968 antitrust decision of the Court of Appeals was brought to Congress's attention early and often, both by interests wishing explicitly to preserve the decision as a salutary example of the antitrust laws' application to foreign-to-

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[9] As the Commission pointed out in the Supplementary Information to the proposed rule, the Court of Appeals also expressed some uncertainty whether the Commission's 1916 Act decision had been correct. 404 F.2d at 810 n.16, 818-19.

foreign conduct outside the reach of the Shipping Act, e.g., DOJ testimony in 1979 Hearings at 89 (quoted above), and, as Sea-Land's more indirect 1981 testimony shows, by interests wishing to remove such activities from the antitrust laws while keeping them also outside the Shipping Act.

On May 25, 1982, the Senate Commerce Committee reported out S. 1593. Section 5 of the bill described the agreements required to be filed and continued to except "agreements related to transportation to be performed within or between foreign countries." The antitrust immunity provision (section 8) was expanded slightly in its application to foreign-to-foreign agreements. Although there was no direct reference to Pacific Seafarers or the other types of foreign-to-foreign services described by Sea-Land, the provision now broadly included "any agreement or activity that relates solely to ocean or through transportation services within or between foreign countries whether or not via the United States." The Senate Committee's analysis of section 8 stated:

> By operation of section 8, this proposed Shipping Act is made the sole governing law over the regulated ocean transportation activities of common carriers, conferences, marine terminal operators, and shippers' councils operating in the U.S. foreign commerce. The intent is to resolve conflicts between the Shipping Act and the antitrust laws in the maritime sector in favor of Shipping Act jurisdiction. Only the standards, remedies and penalties of this legislation will apply. Carriers operating in the U.S. foreign commerce will no longer face a dual risk of being regulated under both the Shipping Act and the antitrust laws for their conference activities.
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> In addition, transportation service within or between foreign countries, terminal services in foreign countries, as well as the activities of foreign shippers' councils are exempted from the antitrust laws. This is done in furtherance of the policy objective of the bill to harmonize U.S. shipping regulation more closely with that of our trading partners.

S. Rep. No. 414, 97th Cong., 2d Sess. 34 (1982) (emphases added).

The Commission interprets this discussion as evidence of an understanding on the part of the Senate Committee that: (1) the primary antitrust immunity available under the Shipping Act, i.e., that applicable to agreements required to be filed with the Commission under section 5, would govern carriers operating in the foreign commerce of the United States and thus subject to Commission regulation; (2) that a conceptually separate antitrust immunity also was desirable for certain foreign activities, including foreign-to-foreign carriage covered by section 5's exception from mandatory filing; and (3) this latter immunity was not a quid exchanged by carriers and other maritime entities for a regulation quo; on the contrary, it was an apparent continuation of Congress's efforts two years previous to address the concerns of DOJ, CSG and CENSA by removing the designated foreign activities from both the antitrust laws and the Shipping Act.

It should be noted at this juncture that some of the commentators in the instant rulemaking view their activities under foreign-to-foreign agreements as not subject to

Commission regulation. In supporting the proposed exemption for contiguous trade foreign agreements, ANERA et al. stated:

> Regulation of these agreements should be minimal because . . . these agreements will not be subject to the tariff-filing and most other requirements of the Act. Thus, the exemption should not affect the Commission's regulation of foreign-to-foreign agreements.

Comments of ANERA et al. at 8. DOJ argues in its opposition to the proposed rule that Congress meant to authorize the Commission to administer antitrust immunity only where the antitrust laws are replaced by regulatory oversight. DOJ Comments at 3-4, 15.

On June 16, 1982, the House Merchant Marine Committee reported out its version of the new Shipping Act. The bill contained provisions excluding foreign-to-foreign agreements from mandatory filing and granting them antitrust immunity, which were identical in all important respects to the Senate provision reported out three weeks earlier. The House Committee addressed certain foreign-to-foreign operations that do touch the United States and are not confined to foreign countries; it was the Committee's view that such operations nonetheless were not subject to regulation by the Commission:

> [The provision] would cover both landbridge and all-water services between foreign countries that transit or touch the United States. They ought not lose their antitrust exemption due to that contact. They are not subject to the 1916 Act today, and the risk of antitrust issues arising is currently present. U.S.-flag carriers ought not be inhibited from participating in such trades.

H.R. Rep. No. 611 (Part I), 97th Cong., 2d Sess. 37 (1982).

The 97th Congress ended before the revised Shipping Act could be enacted. However, the reform process was renewed immediately at the beginning of the 98th Congress, and the ensuing committee reports showed no change in the assumptions and understandings discussed above. On February 17, 1983, the Senate Commerce Committee reported out S. 504, the "Shipping Act of 1983." With respect to section 4 of the bill, entitled "Agreements Within Scope of Act," the Senate Report said:

> This is a jurisdictional section . . . . It describes those types of agreements that are to be subject to Commission jurisdiction. These activities and agreements are exempted from the antitrust laws by section 8.

S. Rep. No. 3, 98th Cong., 1st Sess. 21 (1983). With respect to section 8, "Exemption from Antitrust Laws," the Committee echoed its 1982 report:

> Section 8 extends antitrust immunity to agreements of ocean common carriers . . ., and to other activities regulated under provisions of the bill.
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> * * *
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> The intent of these provisions is to confer antitrust immunity on agreements and conduct properly submitted to the regulatory process of the act.

Id. at 29. There was no comment this time on section 8's separate immunity for foreign-to-foreign agreements, which continued to be excepted from mandatory filing.

On March 1, 1983, the Senate passed the new Shipping Act. On April 12, the House Merchant Marine Committee

reported out H.R. 1878, and repeated almost verbatim from the 1982 report its statement that landbridge and all-water services between foreign countries "that transit or touch the United States" were not subject to the Shipping Act but nevertheless might fall within the reach of the antitrust laws, unless an immunity was provided. H.R. Rep. No. 53 (Part I), 98th Cong., 1st Sess. 33 (1983).

At this point, the relevant agreement filing and antitrust immunity provisions of the Senate and House bills, including the provisions excepting foreign-to-foreign agreements from mandatory filing while granting them unqualified immunity, were essentially unchanged from 1982. However, on July 1, 1983, the House Judiciary Committee reported out H.R. 1878 with some amendments reflecting its pro-antitrust point of view. The Committee in effect adopted the position first espoused by DOJ in 1979 that the Pacific Seafarers antitrust decision by the Court of Appeals should be preserved. Thus, the qualifying phrase was added to what became section 7(a)(3) of the 1984 Act, withholding immunity from foreign-to-foreign agreements that had certain effects on United States commerce. The Committee's intent was:

> . . . to ensure that although the antitrust laws generally will not apply to transportation services within or between foreign countries, they will apply if such activity has a "direct, substantial and reasonably foreseeable effect on the commerce of the United States." This language . . . assures that the antitrust laws will still apply in a factual setting comparable to that in Pacific Seafarers, Inc. v. Pacific Far East Line . . . . The Committee notes that because

> agreements involving transportation between two foreign countries need not be filed under this Act (section 4(a)), the only remedy available to a plaintiff injured in the context of Pacific Seafarers would likely be under the antitrust laws.

H.R. Rep. No. 53 (Part 2), 98th Cong, 1st Sess. 32-33 (1983).

On October 6, 1983, the House Merchant Marine and Judiciary Committees announced a compromise version of the legislation, which brought about the last relevant changes to the 1984 Act before it became law. Abandoning its previous efforts in support of unqualified antitrust immunity for foreign-to-foreign shipping operations of all types, the Merchant Marine Committee acquiesced to the revival of Pacific Seafarers antitrust jurisdiction:

> Consistent with the concerns set forth in the report of the Judiciary Committee, [section 7(a)(3)] leaves the antitrust laws in place for factual settings comparable to that in Pacific Seafarers . . . .

129 Cong. Rec. H8124, 8125 (daily ed. Oct. 6, 1983). In addition, the joint statement appears to indicate an understanding between the two Committees that only agreements required to be filed with the Commission are eligible for the separate immunity provided by section 7(a)(1):

> The compromise . . . excludes from antitrust immunity agreements among common carriers to establish, operate, or maintain a marine terminal in the United States. Because no antitrust immunity would be conferred on such agreements, the compromise amendment also eliminates the requirement . . . that they be filed.

Id. While the Committees there were discussing a type of terminal agreement not involved in this proceeding, such agreements now are coupled with foreign-to-foreign agreements in section 5(a)'s exception to agreements that are required to be filed.

In sum, the legislative history provides no support for the proposition that, by preserving antitrust jurisdiction over foreign-to-foreign agreements with "direct, substantial and reasonably foreseeable" effects on U.S. commerce, Congress meant to expand simultaneously the reach of the Shipping Act to make available to parties to such agreements a way of immunizing themselves. On the contrary, both the House and the Senate were consistently aware that there were certain maritime activities that never had been regulated under the Shipping Act, but that nevertheless could be reached under the antitrust laws. The only question raised before Congress concerned the application of the antitrust laws to such activities, and there is no evidence of a suggestion from any quarter that the issue be resolved by trading antitrust jurisdiction for increased Shipping Act jurisdiction.

It also should be noted that incorporation of an "effects" jurisdictional test into the 1984 Act would have represented a fundamental change in established law. In administering section 15 of the 1916 Act, the Commission several times rejected the argument that the applicability of the statute's filing requirements to agreements in U.S.

foreign commerce should, like the antitrust laws, vary according to the commercial or competitive impact of such agreements. Agreement No. 9955-1 - A/S Billabong, et al., 18 F.M.C. 426, 460-62 (1975); Investigation of Practices, Operations, Actions and Agreements - West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade, 10 F.M.C. 95, 112 (1966) ("[T]he Shipping Act itself specifically has extraterritorial application; it does not require demonstrable impact on our commerce."); Unapproved Section 15 Agreements - Spanish/Portugese Trade, 8 F.M.C. 596, 600-601 (1965) ("[I]n requiring the filing and approval of such agreements as a condition precedent to their lawfulness, Congress itself has determined that the agreements by their very nature have an 'effect' on our foreign commerce.") The jurisdictional reach of section 15, therefore, depended only on whether a particular agreement by its terms fell within one of the statute's categories. Volkswagenwerk v. FMC, 390 U.S. 261, 273-77 (1968). The precise nature and degree of an agreement's commercial impact was, in broad terms, relevant instead to the separate issue of approvability. FMC v. Svenska Amerika Linien, 390 U.S. 238 (1968); Unapproved Section 15 Agreements - Spanish/Portugese Trade, 8 F.M.C. at 601.

Despite its abolishment of pre-implementation approval, the 1984 Act preserves this distinction. Section 4, 46 U.S.C. app. 1703, continues to define the agreements subject to its jurisdiction by party and subject matter -- in short,

by an agreement's terminology. An agreement's actual commercial impact is now relevant, under section 6(g), to whether the Commission should seek an injunction against its implementation. If Congress had meant to create a deviation from this longstanding dichotomy, so as to allow FMC jurisdiction over foreign-to-foreign agreements to be determined by commercial effect, it could be expected to have spoken explicitly and precisely. Since it did not, it would be improper for the Commission to impute such an intent.

C. "Common Carrier" and Subject Matter Jurisdiction

As already indicated, any effort to offset the Pacific Seafarers amendment to section 7(a)(3) necessarily implicates the jurisdictional boundaries set out in section 4. According to section 4, the 1984 Act applies to particular concerted activities when those activities are engaged in by two or more "ocean common carriers." Section 3(6), 46 U.S.C. app. 1702(6), states in relevant part:

> "common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that -
>
> * * *
>
> utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country
> . . . .

DOJ contends that carrier parties to foreign-to-foreign agreements are not "common carriers" insofar as those

operations are concerned, and that the Commission may not exercise jurisdiction over such agreements even though it may be able to establish in personam jurisdiction over the agreements' parties. It argues that the proposed rule, if adopted, would contravene Austasia Intermodal Lines, Ltd. v. FMC, 580 F.2d 642 (D.C. Cir. 1978) ("ACE"). Austasia Intermodal Lines, Ltd., d/b/a Austasia Container Express ("ACE"), offered through transportation from Detroit to Australia. The service consisted of truck transport from Detroit to Windsor, Ontario, rail transport across Canada to Vancouver, B.C., and ocean transport from Vancouver to Australia. After an investigation, the Commission ordered ACE to cease its service until it complied with the 1916 Act's tariff filing requirements. The Court of Appeals reversed, holding that ACE was not a common carrier within the 1916 Act.[10] The court stated:

> According to the statute, a common carrier by water in foreign commerce is one that transports people or cargo by water between the United States and a foreign country; thus, by clear implication, a United States port is required somewhere along the route.

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[10] Section 1 of the 1916 Act defined a "common carrier by water in foreign commerce" as a

> common carrier . . . engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade . . . .

46 U.S.C. 801 (1982). As DOJ points out, the 1984 Act added the requirement that the covered transportation must utilize "a vessel operating . . . between a port in the United States and a port in a foreign country."

Id. at 644. The court added:

> As stated earlier, * * * the definition clearly requires that a carrier make use of a United States port at some point on its own route or a through route in which it participates. Therefore, because ACE ship[s] by land rather than by water out of the United States and then transport[s] cargo solely between foreign ports, we do not believe that [it falls] within the statutory definition on which the Commission's power to require tariff filing is based.

Id. at 646.

In the fall of 1981, the Senate Commerce Committee had before it S. 125 and S. 1593, the two "alternative" reform bills. S. 125 sought to undo ACE by defining "common carrier by water in foreign commerce" to include any carrier engaged in export or import commerce "whether or not its service operates through or originates or terminates at ports of the United States or its territories or possessions." (Section 102(5)). S. 1593 retained the traditional definition from the 1916 Act.

Subsequently, it was agreed that the ACE issue should be taken up separately from the general revision of the Shipping Act. When the Commerce Committee reported out S. 1593 on May 25, 1982, it not only left ACE undisturbed, but drew the following additional distinctions:

> [The definition of "common carrier"] applies only to the extent the passengers or cargo transported are loaded or discharged at a U.S. port. Thus, a liner carrier that accepts U.S.-origin intermodal cargo (or, for that matter, Canadian-origin cargo) at Halifax and calls at Boston for further loading en route to Rotterdam would be a "common carrier" for purposes of the bill only with respect to the Boston-Rotterdam leg of its voyage.

S. Rep. No. 414, 97th Cong., 2d Sess. 26 (1982).

On the same day, hearings were held in the Senate on S. 2414, which would have defined "common carrier by water in foreign commerce" to include:

> . . . a common carrier engaged in the ocean transportation of property originating in or destined to a United States point by way of a port in a nation contiguous to the United States . . . .

Canadian Cargo Diversion, Hearing before the Subcommittee on Merchant Marine of the Senate Committee on Commerce, Science and Transportation on S. 2414, 97th Cong., 2d Sess. 3-4 (1982). The Commission, which was essentially neutral on the legislation, described its jurisdictional impact as follows:

> [T]he legislation does not, nor could it, extend the scope of the Shipping Act to carriers providing transportation which takes place wholly outside the United States. For example, a carrier providing transportation from a port or point in Canada or Mexico to Europe or Asia cannot be subject to U.S. regulations, even if the cargo originated in the United States. A carrier, in order to be subject to regulation, must undertake to transport the cargo within the United States.

Id. at 18 (statement of C. Jonathan Benner, General Counsel).

The ACE bill died in committee, with no report issued. Consequently, on February 17, 1983, when the revised Shipping Act was reported out again in the new Congress, with "common carrier" defined as it is now by the 1984 Act, the Senate Commerce Committee repeated its comments from 1982:

> This definition applies only to the extent the passengers or cargo transported are loaded or

> discharged at a U.S. port. Thus, a liner carrier that accepts U.S.-origin intermodal cargo (or, for that matter, Canadian-origin cargo) at Halifax and calls at Boston for further loading en route to Rotterdam would be a "common carrier" for purposes of the bill only with respect to the Boston-Rotterdam leg of its voyage.

S. Rep. No. 3, 98th Cong., 1st Sess. 19 (1983).

The importance of ACE to this proceeding lies in the fact that, unlike the antitrust laws, the Shipping Act is industry-specific: it regulates only particular activities engaged in by particular entities. ACE established that the breadth of the Commission's power to require tariff filing is ultimately coextensive with the statutory definition of "common carrier": only persons meeting that definition must comply with the Shipping Act's tariff provisions. 580 F.2d at 646. Similarly, the definition of "common carrier" in section 3(6) and the employment of that term in section 4 circumscribes the agreements over which the Commission may exercise subject matter jurisdiction. Compare Atchison, Topeka and Santa Fe Railway Co. v. United States, 597 F.2d 593 (7th Cir. 1979). The bill to undo ACE would have broadened the operative definition only to the extent necessary to reach carriers actually accepting or releasing cargo within the United States, and there seems to have been a general assumption in 1982 that the Shipping Act could not be amended to encompass "contiguous" operations confined to Canada or Mexico (or, a fortiori, operations between more distant foreign nations). In light of that legislative history and the definitional distinctions repeatedly drawn

by the Senate between U.S.-foreign and foreign-to-foreign legs of the same voyage, we conclude that section 4's subject matter jurisdiction applies only when the activities listed therein are engaged in by two or more persons "holding [themselves] out to the general public to provide transportation by water of passengers or cargo," 46 U.S.C. app. 1702(6), and, further, only to the extent that the transportation covered by the particular agreement is "between the United States and a foreign country . . . ." Id.

Thus, persons who enter into agreements governing, in whole or in part, transportation between foreign ports are not "common carriers" to the extent of such concerted activities,[11] and the activities themselves are not "agreements" within the meaning of section 4.[12] Given the

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[11] The two Canadian commentators on the Commission's proposed rule, CAST and CML, regard themselves as presently removed from the Shipping Act:

> Neither CAST nor CML presently provide transportation by water between a port in the United States and a port in a foreign country. In the future, however, either or both of these carriers could operate feeder services between one or more U.S. Great Lakes ports and, for example, Montreal for through shipment to and from Europe or provide line haul vessel calls at U.S. ports in connection with other trades in the foreign commerce of the United States. Thus either CAST or CML, or both, could become an "ocean common carrier" under the Act.

Comments of CAST and CML at 4.

[12] Under this analysis, section 5(a)'s exception for foreign-to-foreign agreements is, in theory, not strictly necessary.

Commission's earlier conclusions against the concepts of voluntary filing and Shipping Act jurisdiction implied from section 7(a)(3), we conclude finally that to the extent concerted activities in ocean trades between foreign nations have "direct, substantial and reasonably foreseeable" effects on U.S. commerce, they are within the jurisdiction of the antitrust laws pursuant to section 7(a)(3) and are not eligible for the antitrust immunity offered by sections 4, 5(a) and 7(a)(1).[13] The issue whether such activities should be made eligible for Shipping Act immunity, for the policy reasons described in the Supplementary Information to the proposed rule, must be resolved by Congress in the first instance. The Commission intends to include this issue in the report it is preparing pursuant to section 18 of the Act, 46 U.S.C. app. 1717, for submission to Congress in 1989.

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[13] The precedents that lend support to FMC jurisdiction over some types of foreign-to-foreign transportation, e.g., Trans-Pacific Freight Conference of Japan v. FMC, 314 F.2d 928 (1963), precede both ACE and the repeated expressions of Congressional will in the legislative history of the 1984 Act that the new statute should be limited precisely to transportation between the United States and a foreign country. The Commission now is bound to treat an agreement that encompasses both U.S.-foreign and foreign-to-foreign carriage as separate agreements, with only the former subject to the Shipping Act. Compare Trans-Pacific Freight Conference of Japan v. FMC, 314 F.2d at 933-34 n.6; Oranje Line v. Anchor Line Ltd., 5 F.M.B. 714, 727-29 (1959).

## CONCLUSION

The Commission concludes that it is without jurisdiction to regulate agreements among ocean carriers regarding foreign-to-foreign transportation. Such agreements no longer will be accepted for filing under section 5 of the 1984 Act.

THEREFORE, IT IS ORDERED, That the proposed rule is withdrawn and this proceeding is discontinued.

By the Commission.

Joseph C. Polking
Secretary